IN THE

Supreme Court of the United States

OCTOBER TERM 1971

NO. _____

ESPANOLA LAKEY WHITFIELD, ET AL, *Petitioners*

v.

KLEIN INDEPENDENT SCHOOL DISTRICT, ET AL,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The Petitioners pray that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Texas entered in the above entitled cause on May 19, 1971, refusing the Appellants' Application for Writ of Error.

CITATIONS TO OPINIONS BELOW

The Opinion of the Texas Court of Civil Appeals for the 14th Judicial District of Texas is reported at 463 S.W.2d 232 (1971), and is printed in the Appendix hereto. The Supreme Court of Texas did not deliver an opinion in this case.

JURISDICTION

The Judgment of the Texas Court of Civil Appeals for the 14th Supreme Judicial District was entered on January 20, 1971. The Motions for Rehearing were denied on February 10, 1971. The Judgment of the Supreme Court of Texas was entered on May 19, 1971.

The Jurisdiction of this Court is invoked pursuant to 28 U.S. Code 1257 (2) & (3), Petitioners having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

The Petitioners, land owners residing in the North Harris County, Texas, community of Klein near Houston, were deprived of certain valuable real estate under circumstances amounting to Eminent Domain, for the purpose of constructing a public school. Because the land was simultaneously converted to the private use of school officials, Petitioners sought to vacate the conveyances:

1. Under these circumstances were Petitioners denied rights guaranteed by the "due process" clause of the Fourteenth Amendment to the United States Constitution since their private property was taken by a state agency for purely private uses?

2. May the State of Texas establish procedures wherein the Petitioners' private property may be taken for private use in violation of the Due Process clause of the Fourteenth Amendment to the Federal constitution?

The Petitioners' rights will be affected by any decision upon the Constitutionality of Texas Procedure permitting the taking of private property for private use; and there

is substantial public interest in the continued unconstitutional operation of procedures permitting such taking of property.

CONSTITUTIONAL STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves Eminent Domain procedure provided by the Statutes of the State of Texas, and Texas Statutes relating to the acquisition of Land by Public Free School Districts.

Constitution of Texas—Article 1, Section 17.
Vernons Annotated Civil Statutes of Texas—Article 2773.
Vernons Annotated Civil Statutes of Texas—Article 2797.
Texas Education Code—Section 17.26.
Texas Education Code—Section 17.31.
Texas Education Code—Section 23.31.

TEXTS

C.J.S. Schools and School Districts, Section 277, page 1252 (1952).
26 Am. Jur. 2d—Eminent Domain—Sections 25-38.

STATEMENT

Petitioners and their ancestors were the owners of a 7.82 acre tract of land in North Harris County, Texas. This land was out of a tract of more than 100 acres which had been in Petitioners family since approximately 1890. The Petitioners came to the North Harris County, Texas area at approximately that time as Servants of German

Immigrants. Their parcel of land was in excess of 100 acres. The land had not been farmed for a number of years and in the meantime the community had become generally a suburban agricultural and residential area, and part of the KLEIN INDEPENDENT SCHOOL DISTRICT. The Respondents are the KLEIN INDEPENDENT SCHOOL DISTRICT, their Trustees and others who acted in concert with them. Acting pursuant to a resolution of the Respondent, SCHOOL BOARD, Mrs. MARJORIE CHITWOOD, a Real Estate Agent, was empowered to acquire certain land for the purpose of building a school.

After several months of negotiations with the Petitioners she was unsuccessful in purchasing their land. Members of the Board of Education, together with the Superintendent, also negotiated with the Petitioners as did the Attorney for the Board. They informed the Petitioners both in person and by letters on numerous occasions, that unless the land was voluntarily sold for the purpose of constructing a school it would be condemned. One of the Petitioners stated on direct examination on the trial of this cause that the term "condemned" to her meant that the land would be taken and that they would receive no consideration since it was required for the construction of a Public School. The Petitioners thereafter reluctantly sold their land, the deed being executed by some of them in the offices of the School Board Attorney. The Deed Records of the Harris County Clerk reflect that the conveyance was executed in two parts beginning in September of 1962 and ending March, 1963. It was recorded on June 26, 1963: MR. R. E. LYONS, Superintendent of the School District purchased the Petitioners' land directly from the School District, without a bid, in

a Deed executed on May 14, 1963, less than 60 days after the land was acquired for "school purposes", and approximately 10 days before the Texas Legislature passed a law requiring school districts to take bids on such sales. The Deed Records further reflect that on August 31, 1962 two adjacent tracts of land, tracts 3 and 4** were purchased by Superintendent Lyons from MRS. MARJORIE CHITWOOD, the agent employed by the Respondent to acquire the land. Prior to the time Petitioners' land was acquired by the Respondents such land was stated to be in excess of what was required for the school. The land had previously been conveyed by the board to MRS. CHITWOOD. Superintendent LYONS shortly thereafter constructed his private residence on this land and continues to reside there. He is no longer employed by the Respondent School District.

Upon discovery that the land had been committed to private use the Petitioners requested the board to reconvey the same to them since it was not required for the purpose of constructing the school as has been previously represented to them. The Board respectfully declined whereupon the Petitioners instituted suit in the 133rd District Court of Harris County seeking to have the conveyances set aside and requesting damages for the wrongful acquisition and use of the land. Upon trial of the cause the jury found against the Petitioners on all issues except fraud but also found that the Petitioners were not substantially damaged by reason of the conveyance. Con-

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** The validity of the taking of Tracts 3 and 4 is now pending in the 11th District Court of Harris County, Texas in Cause Number 668,034-B, these tracts having been taken under the same circumstances as Petitioner's land.

sequently the proceeding to vacate and set aside the conveyance were denied.

In their appeal to the Texas Court of Civil Appeals the Petitioners sought to reverse the Judgment of the District Court on the ground that the Judgment was void since it permitted the taking of private property for private use and was consequently void as a matter of law under the Due Process Clause of the Fourteenth Amendment. The Court of Civil Appeals rejected this contention and affirmed the Judgment of the trial court. However, the Court stated that a taking of private property under the guise of public use may violate Due Process and constitute a legal fraud, upon property owners even though there be no fraudulent intent. See 463 S.W.2d 232, Page 235.

In its Application for Writ of Error to the Supreme Court of Texas the Petitioners urged that the taking of their property for private use under the guise of public use violated the Due Process Clause of the Federal Constitution and the Constitution of the State of Texas and was void as a matter of law. The Supreme Court of Texas, on May 19, 1971, refused the Application for Writ of Error and made no determination concerning the Petitioners' constitutional claims.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In the Petition to the District Court of Harris County seeking to set aside and vacate the conveyances the Petitioners sought the restitution of their property on the grounds that it had been fraudulently taken under the guise of public use and converted to private use in violation of the Federal Constitution.

Following an extensive trial in the District Court a jury found against Petitioners on all issues except fraud.[1]

The District Court entered judgment against the Petitioners on this verdict and denied a Motion for New Trial.

On Appeal to the Court of Civil Appeals, Petitioners again asserted that the taking of their property for private use was a violation of the due process clause of the Fourteenth Amendment and in conflict with prior decisions of the United States Supreme Court.

The Court of Civil Appeals rejected these assertions and affirmed the judgment of the District Court on January 20, 1971.

The Petitioners' Motion for Rehearing was overruled on February 10, 1971.

In the Application for Writ of Error to the Supreme Court of Texas, Petitioners asserted that the taking of private property for private use was in violation of Article 1, Section 17 of the Constitution of Texas as well as the Due Process clause of the Fourteenth Amendment to the Federal Constitution.

The Supreme Court of Texas denied Petitioners Application on May 19, 1971, without written opinion. 463 S.W.2d 232.

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1. In Texas, Jury cases are submitted on Special Issues, a method whereby a case is submitted in question and answer form. Prior to deliberation a jury may never be advised of the effect of its answer to any issue submitted.

REASONS FOR GRANTING THE WRIT

The Court should grant Certiorari to consider the Petitioners' contention that the decision below, permitting the taking of private property for private use, under the guise of public use is in conflict with the principles declared by this Court to be unconstitutional and is unconstitutional under the due process clause of the Fourteenth Amendment.

The decision of the Court below is in conflict with the decision of this Court as exemplified by *Falbrook Irrigation District v. Bradley,* 164 U.S. 112, 41 L.Ed. 369, 17 Sup. Ct. 56; *Madisonville Traction Company v. St. Bernard Mining Company,* 196 U.S. 239, 49 L.Ed. 462, 25 Sup. Ct. 251; *Harrison v. Danville and Western Railroad Company,* 208 U.S. 598, 52 L.Ed. 637, 28 Sup. Ct. 331, 13 Ann. Cas. 1008. This Court has long made clear the taking of property for nonpublic use by a State agency is a denial of due process law. Indeed, public use is a basis of any taking of property by a State or its agencies and such use must be specific and definite at the time the land is taken, and after taking has been exercised, the public use justifying the taking must be begun within a reasonable time. *Lance's Appeal,* 55 Pa. 16, 93 Am. Dec. 722; *County of Allegheny v. Frank Mashuda Company,* 3 L.Ed.2d 1163. The records in this case stand undisputed that the Respondents took the Petitioners land for the purpose of constructing a public school and less than sixty days thereafter conveyed it to one of its officers for his own private use. Further, the Respondent's actions appear more suspect since they had commenced a course of disposing of excess property in the same Tract prior to the time the Petitioners' land was acquired. Under these cir-

cumstances the conclusion appears inescapable that the Plaintiffs' land was not required for any public use at the date of its acquisition—indeed this jury so found—and that clearly the intention of the Respondents were to acquire the Petitioners' land for other than public use.

In its opinion the Texas Court of Civil Appeals has reasoned that it is not bound by prior decisions of the United States Supreme Court with respect to the due process requirements for the taking of property since under rules peculiar to Texas only, the Petitioners are required to do and perform certain acts such as tendering the return of any consideration received before they can prevail in any action to cancel a conveyance of land not put to public use. *Casualty Reciprocal Exchange v. Bryan,* 101 S.W.2d 895, (Tex. Civ. App. 1937); *Texas Employers' Ins. Assn. v. Kennedy,* 135 Tex. 486, 143 S.W.2d 583 (1940); *City of New Braunfels v. City of San Antonio,* 212 S.W.2d 817, (1948). That is, it is the premise of the Respondents that in its proceedings to acquire the Petitioners real estate they were not bound by prior holdings of the Supreme Court of the United States with respect to Due Process.

Since the propositions advanced by the Respondents and sustained by the Texas Courts are in substantial conflict with prior holdings of the Supreme Court of the United States, Petitioners feel compelled to recall some of the basic constitutional propositions which appear to be settled doctrine in such cases. The controlling legal principles are plain since the command of the Fourteenth Amendment is that no state shall deny any person within its jurisdiction Due Process of law. Thus the prohibitions of the Fourteenth Amendment extended to all actions of a state and its agencies (i.e. Respondent School Dis-

trict) denying Due Process of law, whatever the agency of the state taking the action. In short, the constitutional rights of the Petitioners not to have their land taken by a state agency for private use cannot be nullified by the Respondents', evasive schemes for placing valuable real estate in the hands of private parties, whether such schemes are employed ingeniously or ingenuously.

Article IV of the Constitution makes the Constitution the "Supreme Law of the Land." In 1803 Mr. Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as the "fundamental and paramount" law of the nation, declared in the notable case of *Marbury v. Madison,* 1 Cranch 137, that "it is emphatically the province and the duty of the Judicial Department to say what the law is." This decision declared that the basic principle of the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system. It follows then that the interpretation of the due process clause in the Fourteenth Amendment enunciated by the Supreme Court of the United States in *Madisonville Traction Company, Falbrook Irrigation District and Harrison v. Danville,* Supra; is the supreme law of the land, and Article VI of the Constitution makes it of binding effect on the State of Texas and Respondent, a subdivision thereof, "anything in the law of Texas to the contrary notwithstanding."

In determining whether the Petitioners' land was taken by the State Agency for private use The Court need only chronicle the course of events in the transaction for the acquisition of the land. First, the agency employed independent Real Esate agents to acquire the land, how-

ever they were unsuccessful; thereafter, the agency by its own officers, conducted several months of negotiations with the Petitioners and were still unsuccessful up to and until the time the attorney for the agency stated emphatically to the Petitioners that their land was required for the purpose of constructing a public school and that unless they sold the same to the State Agency forthwith it would be condemned. The record further indicates that the Petitioners were persons of limited sophistication and that the attorney declined to explain to them the meaning of the term "condemn" or that it was necessary for them to seek legal counsel of their own. Several months prior to the date of the acquisition of the Petitioners' land the agency had commenced a course of selling "excess" property and one of its agents had acquired such property. Then less than sixty days after the Petitioners' land was acquired it was conveyed directly by the agency to one of its officers who used the land to construct his private residence where he continues to reside.

In *Madisonville Traction Company,* 196 U.S. 239, supra, Mr. Justice Harlan in a decision affirming an order of a lower court enjoining the taking of private property for private use, described why the due process clause prohibits the taking of private property for use which is not public in character:

> "There ought not to be any dispute at this date, in reference to the principles which must control in all cases of the taking of private property for public purposes. It is fundamentally an American jurisprudence that private property can not be taken by the government, national or state, except for the purposes which are of a public character although such taking be accompanied by compensation to the owner. That

> principle, this court has said, grows out of the essential nature of all free governments.
>
> . . . Any state enactment in violation of these principles is inconsistent with due process of law prescribed by the 14th Amendment." (196 U.S. 239 at 252).

In the *City of Cincinnati v. Vester,* 33 F.2d 242, affirmed on other gds. 281 U.S. 439, 74 L.Ed. 950, 50 Sup. Ct. 360 (1930), it was held that the taking of additional property in excess of that actually required to widen the street, for the purpose of selling the same at a profit and appropriating the proceeds to recoup the costs of street construction, did not constitute a taking for public use and was void.

Thus, just as private property may not be taken to construct private roadways, *Madisonville,* supra, for private business use, *County of Allegheny,* supra; or for any nonpublic use, 14 ALR 1350, the Petitioners' property may not be taken for the construction of the private residence of one of Respondents' employees.

Certiorari should be granted to decide the questions presented since the Court below erred in its determination that the State agency's taking of the Petitioners' property for private use did not violate the "due process" clause of the Federal constitution.

The record in this case was undisputed that the Respondents at no time used the Petitioners' property for the construction of a school and indeed the jury found that it was not their intent to use such land for the construction of a school, but within approximately sixty days following the acquisition of the Petitioners' land the Re-

spondents conveyed the same to one of its officers for private use and upon which the officer has constructed his residence. While the Petitioners concede that under existing Texas law the Respondents would be empowered to acquire real estate for the purpose of carrying on the business of free public education and for the construction of a "teacherage"; the fact remains that in this case the land was used for neither purpose nor was it intended to be used for either purpose, but rather the entire transaction was a transparent one wherein the Respondents intended to dispossess the Petitioners of their land so that it could be used for private purposes. Such a transaction contravenes the Fourteenth Amendment. *Griggs v. County of Allegheny,* 7 L.Ed.2d 585, 369 U.S. 60, 82 S.Ct. 562 (1962).

The decision below further serves to deprive the Petitioners of their property without due process of law because the decision suggests that while the Petitioners were denied the due process of law in the acquisition of their land by the Respondent, Petitioners would not be entitled to recover for such wrongful acts since Respondents have admitted the wrongful acquisition of the land and pleaded their own wrongful act in defense by stating that the record is silent as to an offer to restore the consideration. It is the contention of the Petitioners in this case that where such a basic violation of the due process clause of both the Texas and the Federal Constitutions are involved it is of little moment that the record contains no offer to restore the consideration actually received.

The fundamental right guaranteed to the Petitioners by the Fourteenth Amendment is that a state shall not deprive them of property under procedures which make it im-

possible to receive just compensation, and impliedly that under no conditions may a state take property for private use. *McCoy v. Union Elevated Railroad Company,* 247 U.S. 354, 62 L.Ed. 1156, 38 S.Ct. 504; *Gibbs v. Zimmerman,* 390 U.S. 326, and 78 L.Ed. 342, 54 S.Ct. 140.

The action of the Defendants is clearly violative of the due process clause of the Fourteenth Amendment of the United States Constitution in that it is a taking of private property by a political subdivision for private use:

The instant "voluntary" conveyance should be treated as a "taking" of private property. The Court below regarded the instant transaction as a "taking", and reasonably so because of the aspect of undue influence and coercion by misinformation pervading the case. Plaintiffs were led to believe that if they did not convey their parcel of land to Defendant School Board, the Board could and would take it by condemnation proceedings. Plaintiffs, after resisting the Board's tactics for some months, finally came to terms but did so while held in ignorance of the fact of the Board's changed position as to its right and probability of success in taking Plaintiffs' land by condemnation proceedings. The Board received Plaintiffs' land as surplus and unnecessary to its lawful purposes. Yet, the School Board did not itself nor through its Agent inform the Plaintiffs it could no longer "take" their land. The instant voluntary conveyance has all the substance of a "taking" and should be so treated. To regard it otherwise than a "taking" is to open the door to such abuses as a political subdivision's using pseudo-voluntary procedure to obtain property in order to circumvent the due process requirements of a "taking" in condemnation proceedings.

The question of whether the taking of private property in pursuit of an objective outside the statutory authority of the taking State agency is a violation of substantive due process is of general importance.

The instant property was taken for a *private* purpose, and in addition or in the alternative was taken for a purpose beyond the authority of the School Board to pursue, both of which are violations of the due process clause of the Fourteenth Amendment.

The jury found that at the time the land was taken it was not the intent of the Board to use the land for School purposes. Moreover, taking the land for reconveyance as surplus hardly qualifies as taking it for the public use. The fact that the re-conveyance was to the Superintendent of the School Board, Mr. Lyon, only makes this transaction more egregious. Furthermore, this is not the instance of a taking where resale is authorized when and if the property is determined no longer necessary for public use, *Davis v. City of Lubbock,* 326 S.W. 2d 699 (Texas Sup. 1959), but is the very different case of a taking of land with contemporaneous knowledge and purpose that a definite and separate part is not necessary for public use. See *State v. Giessel,* 60 N.W.2d 873, 882 (Wisc. 1953).

The taking of private property for a private purpose is a violation of the Due Process Clause of the Fourteenth Amendment even though compensation be paid. See *Thompson v. Consolidated Gas Co.,* 300 U.S. 55, 80 (1936) and cases cited therein. Moreover, such a taking also stands in violation of Tex. Const. Art. 1, p. 17. *Maher v. Lasater,* 354 S.W.2d 923 (Tex. Sup. 1962);

see also *Waggoner v. Gleghorn*, 378 S.W.2d 47 (Tex. Sup. 1964).

Indeed, under Texas law such a transaction has been found a fraud upon the owner (vendor) even though fraudulent intent may not be attributable to the taker. *Mosley v. Bradford*, 190 S.W. 824, Tex. Civ. App. (Fort Worth 1916), rev. on other grounds 223 S.W. 171; *Todd v. Massey*, 30 S.W.2d 532 (Tex. Civ. App., Houston [Fourteenth District] 1930), no writ; *Brazos River C. & R. District v. Harmon*, 178 S.W.2d 281 (Tex. Civ. App., Eastland 1944), writ ref'd want of merit.

In addition to the foregoing this transaction is beyond the power of the School District and is therefore void, and a violation of substantive due process.

"Generally speaking, a school district may not make any contract unconnected with the educational purposes for which it is created." 78 C.J.S. Schools and School Districts p. 277, p. 1252. (1952)

In Texas "a quasi-public corporation, such as a School District, which owes special duties to the public, may not enter into any contract that is not expressly authorized by law or necessarily implied from powers expressly granted." *McCorkel v. District Trustees*, 121 S.W.2d 1048 (Tex. Civ. App.—Eastland 1938), no writ. And, where a contract is beyond the scope of the granted powers "the agreement is unauthorized, and a contract may be void as against public policy." 78 C.J.S., Schools 270 p. 1248. (1952)

No Texas Statute confers such authority as would be required to justify the instant transaction. Article 1109c, Sec. 1, V.A.T.S. (replaced in 1969 by § 23.31 of the

Texas Education Code) speaks to the power of eminent domain, limiting its exercise to the purpose of "supplying playgrounds, sites upon which to build school houses, and for such other purposes as may be necessary for such schools." Article 2722, V.A.T.S. (replaced by § 17.31 of the Texas Education Code in 1969) concerns the county boards of education:

> "Said Board shall have the right to purchase, acquire by the right of eminent domain, lease, receive, hold, transmit, and convey the title to the real and personal property for school purposes except where otherwise provided. . . ." (emphasis supplied)

This Statute clearly expresses a legislative intention that a School Board was not to acquire (through any means) land which was not to be used for school purposes. The Board exists to manage the school. It has no authority to make land transactions which are not related to the school.

Article 2905, V.A.T.S. (replaced by § 17.26 of the Texas Education Code) also gives such limitations. It limits county school trustees' power to purchase land which is "necessary" for the schools. In the case at hand the jury has found that there was never any intent to use the land for school purposes.

The conveyance in question is void as unrelated to the functions of the School District and beyond the powers of the trustees. It is also void because the district acquired land in excess of what was needed for construction of the school. *City of Wichita Falls v. Thompson*, 431 S.W.2d 909 (Tex. Civ. App.—Fort Worth 1968, writ ref'd, n.r.e.).

Now, given the fact that the Board exceeded its authority in the purchase and re-conveyance of the Plaintiffs' land, the action of the Board in so doing can be fairly said to bear no reasonable relation to any proper governmental purpose, and thus constitutes an arbitrary and even capricious exercise of governmental power. It is at this point that the higher courts of other states have said the governmental board loses its authority to take property. See *Valley National Bank v. Glover,* 159 P.2d 292 (Ariz. 1945) and *Albritton v. City of Winona,* 178 So. 799 (Miss. 1938) app. dism'd 303 U.S. 627. Moreover, it has been said that the States' powers of eminent domain can be exercised only within the bounds of fundamental right and justice incorporated in the due process clause, and that arbitrary or capricious exercise of those powers violates due process. *Truax v. Corrigan,* 257 U.S. 312 (1921).

In turn, it has been said that absence of proper statutory authority for the exercise of eminent domain constitutes a denial of the substantive element of due process. *Cincinnati v. Louisville & N. Ry. Co.,* 223 U.W. 390 (1911). Observance of the proper form alone is not enough if the result is a violation of fundamental right. *Chicago B. & O. Ry. Co. v. Chicago,* 166 U.S. 226 (1896).

In sum, the instant conveyance evidences a "taking" by the School Board of the Plaintiffs' land for private purposes, an act which in itself and alone violates Plaintiffs' Fourteenth Amendment rights. But, this "taking" stands also in violation of the various statutory limitations upon the power of the Texas School Boards, and in violation of decisions annotating the doctrine of eminent

domain in Texas. These latter infirmities constitute an independent ground for holding the instant transaction as a violation of the due process clause of the Fourteenth Amendment, since the constitutional statutory and case law of the State are necessary elements of substantive due process.

Taking of private property for private use violates the due process clause of the Fourteenth Amendment; and the taking of private property in pursuit of an objective outside the statutory authority of the taking agency violates substantive due process. Plaintiffs therefore respectfully contend the "taking" is null and void.

CONCLUSION

For the above reasons the Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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Houston, Texas 77002
Attorney for Petitioners

CERTIFICATE OF SERVICE

I, CLARKE GABLE WARD, do certify that on the AUG 2 1971 day of _____, 1971, a true and correct copy of the foregoing Petition for Writ of Certiorari was mailed by certified mail to the Attorneys for the Respondent, Knipp & Sedgeley, Citizens Bank Building, Houston, Texas.

I further certify, in accordance to Rule 33 of the Rules of the Supreme Court of the United States, that all parties required to be served have been served.

CLARKE GABLE WARD

APPENDIX

ESPANOLA LAKEY WHITFIELD ET AL., Appellants,

v.

KLEIN INDEPENDENT SCHOOL DISTRICT, ET AL., Appellees.

No. 430.

Court of Civil Appeals of Texas, Houston (14th Dist.).

Jan. 20, 1971.

Rehearing Denied Feb. 10, 1971.

Suit for cancellation and rescission of deeds to land and alternatively for damages for fraud in acquisition of land. The District Court, Harris County, William N. Blanton, Jr., J., rendered take-nothing judgment, and plaintiffs appealed. The Court of Civil Appeals, Barron, J., held that where school district was selling property acquired as excessive acreage before it actually acquired subject tract, allegedly conveyed by owners under threat of condemnation, but owners did not restore or offer to restore consideration received by them for deed to school district, owners were not entitled to rescission or cancellation of deed.

Affirmed.

* * *

Clarke Gable Ward, Houston, for appellants.

James S. Kelly, Richard G. Sedgeley, Knipp & Sedgeley, Houston, for appellees.

BARRON, Justice.

This suit was filed by Espanola Lakey Whitfield and other alleged owners of a tract of land in Harris County, Texas, against Klein Independent School District, R. E. Lyon and others for cancellation and rescission of deeds to the land above and alternatively, for damages for fraud in the acquisition of the land.

The trial court submitted special issues to a jury empaneled to hear the case, and the jury found:

(1) That before the execution of the deeds from the Lakey family to Klein Independent School District, R. E. Lyon, school superintendent, Howard Klein, school board attorney, and Mrs. Majorie Chitwood, agent for the school board, each represented to the plaintiffs, the Lakey family, that tract number 5 (the involved land) would be condemned for school purposes if it were not voluntarily sold to the Klein Independent School District.

(2) That such representations above were not false.

(3) That at the time tract number 5 was conveyed by plaintiffs to Klein Independent School District, it was not the intent of the school district to use said land for school purposes. (Special Issue No. 13).

(4) That thereafter the land was conveyed by the school district to R. E. Lyon for other than school purposes.

(5) That the land was not used for school purposes at any time after it was conveyed by plaintiffs to the school district.

(6) That the fair and reasonable cash market value per acre of the land at the time and under all of the

conditions and circumstances when the deeds in question were executed by plaintiffs to the school district was $770.00 per acre.

Based upon the above jury verdict and the undisputed evidence the trial court rendered a take nothing judgment in favor of the school district, Lyon and the other parties defendant. Plaintiffs have duly perfected appeal to this Court from the judgment below.

The tract of land involved is 7.8 acres and is commonly known as tract 5 of the Benjamin Page Survey, Abstract No. 618, Harris County, Texas. The tract was acquired by ancestors of the present alleged owners about 1900. The record shows that prior to the purchase of tract 5 by Klein Independent School District, defendant, Mrs. Marjorie Chitwood, had been empowered by the school district to acquire various tracts of land for the school district. On several occasions, she, along with Howard Klein, an attorney for the school district, stated to the plaintiffs that the land was needed for the purposes of construction of a school and related facilities and that unless plaintiffs sold the land, it would be condemned. After several months of negotiations with respect to the sale of the land the plaintiffs continued to refuse to sell. Thereafter, Mrs. Chitwood and Howard Klein, by letter and in person stated to the plaintiffs that unless they sold the land forthwith, it would be condemned and used for school purposes. A few months thereafter the plaintiffs conveyed their land to the school district, allegedly under the threat of condemnation. The consideration paid to plaintiffs for the land was approximately Six Thousand Sixty Dollars ($6,060.00).

The deed conveying the land of the plaintiffs to the defendant school district was in two parts, one deed being signed by some of the plaintiffs under date of September 8, 1962 and an additional deed being signed by the remaining owners about the month of March, 1963. On May 10, 1963 the property was conveyed by the school district to its superintendent, R. E. Lyon.

In 1960 the school board of Klein Independent School District made a decision to buy twelve adjacent tracts of land located within the district, upon which a new public high school, a football stadium and other buildings were to be constructed. The tracts are numbered numerically and consecutively from tract 1 at one end to tract 12 at the other end of the total area. Titles were not complete and were clouded on various tracts, including tract number 5, and the task of acquisition of the properties for school expansion was difficult and time-consuming. None of the tracts of land were acquired by means of condemnation proceedings, all tracts being acquired by deeds with the exception of tract 1, which was never acquired by the school district.

Klein Independent School District had raised $850,000.00 for school development and expansion. The costs involved exceeded the estimates of the school board. The amount of the contract for the building alone was $829,200.00, and the estimated cost of the land to be acquired under the original program was about $50,000.00. In addition, equipment had to be purchased such as furniture and related items, and the anticipated expenditures were required to be revised to eliminate some of the cost.

The school board originally instructed Mrs. Chitwood to purchase the designated 92 acres of land. The board

later revised its plans because of the shortage of funds to require only 55 acres of land. Shortly after the conveyance of tracts 3 and 4 by the respective owners to the Klein Independent School District in August, 1962, these two tracts, being then in excess of the land required by the school district, were conveyed to Marjorie Chitwood who subsequently sold them to R. E. Lyon, the school superintendent. for his private use. Such conveyances were consummated prior to the conveyance of tract 5 to the Klein Independent School District by plaintiffs, which occurred in part on September 8, 1962. Thus, the school district was selling property as excessive acreage before it actually acquired the 7.8 acre tract number 5 owned by the plaintiffs. Tracts 6 through 12 acquired by the school district were eventually used for the construction of a football stadium, a school building and various auxiliary buildings and supplementary areas for the school. Lyon purchased 23 of the original 92 acres of land from Mrs. Chitwood and the school board, including tract 5 involved in this suit.

[1] Contention is made by plaintiff-appellants that the jury's answers to the various special issues are conflicting, and that they are insufficient to support a judgment. We overrule such contention. The three special issues inquiring whether representations were made to plaintiffs that unless the land was sold to the school board it would be condemned by the school district involved a state of facts which existed long prior to the actual conveyance referred to in special issue number 13, which inquired concerning the intent of the school district at the time of conveyance. The jury answered each special issue regarding the representations made to plaintiffs in favor of the defendant-appellees, to-wit: that such representations were not false

prior to the execution of the Lakey deeds. Thus, the jury answered the fraud issues in favor of the defendants on the basis of sufficient evidence in the record. We hold that there is no fatal conflict and that the above answers do not conflict with the answer to special issue number 13. The evidence clearly supports the jury's answers to the special issues inquiring whether such representations were false. At the time the representations were made, the school board was in the process of acquiring the land which it thought was necessary, and at that time condemnation would have been proper and authorized.

[2, 3] No recovery can be obtained by plaintiffs on their theory of damages for fraud. The jury found the cash market value of the land to be $770.00 per acre at all material times here involved. Plaintiffs were paid substantially that sum of money per acre when the land was purchased. In an action for rescission of a contract on the ground of fraud, the amount of damage is immaterial, provided it is substantial. Here the damage, if any, is insubstantial. See Dowlin v. Boyd, 291 S.W. 1095, 1098, (Tex. Com. App. 1927); Featherlax Corporation v. Chandler, 412 S.W.2d 783, 789, (Tex. Civ. App. 1966), writ ref., n.r.e.

[4] Were it not for the reasons stated below, we might be inclined to reverse this case, because the jury found on sufficient evidence that at the time the land was conveyed by plaintiffs to Klein Independent School District, it was not the intent of the school district to use said land for school purposes. A taking of property for private use under the guise of a public use may violate due process and may constitute a legal fraud upon property owners, and this is true though there be no fraudulent

intent. See Tod v. Massey, 30 S.W.2d 532, (Tex. Civ. App. 1930), no writ; City of Wichita Falls v. Thompson, 431 S.W.2d 909, 911, (Tex. Civ. App. 1968), writ ref., n.r.e.

[5, 6] The record shows, however, that the plaintiffs, the Lakeys, did not restore or offer to restore the consideration received by them for the deed to the school district, the sum of approximately $6,060.00. We have been unable to find any reference to such a tender or offer of tender by plaintiffs and this record stands with no refutation of an absence of tender of the purchase price or any part thereof. The general equitable rule is that a plaintiff in a suit for the rescission or cancellation of a contract or deed to which he is a party must return, or offer to return, any consideration which he has received under the contract. We are unable to find any exception to that rule in the record. See Casualty Reciprocal Exchange v. Bryan, 101 S.W.2d 895, (Tex. Civ. App. 1937), no writ; Texas Employers Ins. Ass'n v. Kennedy, 135 Tex. 486, 143 S.W.2d 583, (1940), op. adopted; City of New Braunfels v. City of San Antonio, 212 S.W.2d 817, (Tex. Civ. App. 1948), writ ref., n.r.e.; 10 Tex. Jur. 2d, Sec. 45, pp. 372-376. We are therefore required to affirm the judgment of the trial court.

Affirmed.